

IN THE SUPREME COURT OF MISSOURI

---

No. SC86685

---

STATE ex rel. THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

and

GATEWAY WESTERN RAILWAY COMPANY,

Relators,

v.

THE HONORABLE MICHAEL P. DAVID,

Respondent.

---

ORIGINAL WRIT PROCEEDING  
IN MANDAMUS OR, IN THE ALTERNATIVE, IN PROHIBITION

---

RESPONDENT'S BRIEF

---

BECKER, PAULSON,  
HOERNER & THOMPSON, P.C.  
Kevin T. Hoerner #37648  
5111 West Main Street  
Belleville, Illinois 62226  
(618) 235-0020 telephone  
(618) 235-8558 facsimile  
kth@bphlaw.com

Attorneys for Plaintiff

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	3
ARGUMENT .....	5
I      Standard of Review .....	5
II.     Relators’ First Point Relied On: Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under Mo. Rev. Stat. §§ 476.410 And 508.040 Respondent Erroneously Refused To Transfer Venue, In That The Only Resident Defendant Was Pretensively Joined To Create Venue In The City Of St. Louis. ....	6
III.    Relators’ Second Point Relied On: Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The “Law Of The Case” Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.. ....	11
IV.    Relators’ Third Point Relied On: Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The Doctrine Of Res Judicata Respondent Erroneously Refused To Transfer Venue, In That The	

Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.....	13
CONCLUSION .....	14
APPENDIX .....	15
CERTIFICATE OF COMPLIANCE .....	17
CERTIFICATE OF SERVICE .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Allen v. Larabee Flour Mills Corp.</i> , 328 Mo. 226, 40 S.W.2d 597 (Mo. 1931) .....	10
<i>Bailey v. Missouri-Kansas-Texas R.R.</i> , 732 S.W.2d 248 (Mo. App. E.D. 1987) .....	9
<i>Bellon Wrecking &amp; Salvage Co. v. David Orf, Inc.</i> , 983 S.W.2d 541 (Mo. App. 1998) .....	12
<i>Givens v. Warren</i> , 905 S.W.2d 130 (Mo. App. Ct. 1995) .....	14
<i>Jones v. Carnahan</i> , 965 S.W.2d 209, (Mo.App.1998) .....	5
<i>Lomax v. Sewell</i> , 50 S.W.3d 804 (Mo. App. Ct. 2001) .....	14
<i>McClelland v. Ozenberger</i> , 841 S.W.2d 227 (Mo. App. Ct. 1992) .....	12
<i>Oldaker v. Peters</i> , 869 S.W.2d 94 (Mo. App. 1993) .....	12
<i>State ex rel. Breckenridge v. Sweeney</i> , 920 S.W.2d 901 (Mo. banc 1996) ....	7-10
<i>State ex rel. Dehn v. Schriro</i> , 935 S.W.2d 641 (Mo.App.1996) .....	5
<i>State ex rel. Doe Run Resources Corp. v. Neill</i> , 128 S.W.3d 502 (Mo. banc 2004) .....	9
<i>State ex. rel. E.I. du Pont de Nemours and Company, Inc. v. Mummert</i> , 890 S.W.2d 367 (Mo. App. 1994) .....	6,10
<i>State ex rel. Hoeft</i> , 825 S.W.2d 65 (Mo. App. 1992) .....	8
<i>State ex rel. Jackson County Prosecuting Attorney v. Moorhouse</i> , 70 S.W.3d 552, 554 (Mo. App. W.D.2002) .....	5
<i>State ex rel. Linthicum v. Calvin</i> , 57 S.W.3d 855, 857 (Mo. banc 2001) .....	6
<i>State ex rel. Malone v. Mummert</i> , 889 S.W.2d 822 (Mo. banc 1994) .....	11
<i>State ex rel. Nixon v. Kinder</i> , 129 S.W.3d 5 (Mo. App. W.D. 2003) .....	5-6

*State ex rel. Rock Road Frontage, Inc. v. Davis*, 444 S.W.2d 43,  
(Mo. App.1969) .....5

*State ex rel. Shelton v. Mummert*, 879 S.W.2d 525 (Mo. 1994) ..... 8

*Wittman v. National Supermarkets, Inc.*, 31 S.W.3d 517  
(Mo. App. E. D. 2000) .....14

## **Statutes**

MO. ANN. STAT. § 508.040 .....7,12-13

## ARGUMENT

### *I. Standard of Review*

This matter before the Court involves an original writ proceeding in mandamus or in the alternative in prohibition. In seeking a writ of mandamus, “[t]he relator must prove that he has a clear, unequivocal, specific, and positive right to have the official perform the act demanded, and the remedy will not lie if the right is doubtful.” *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. 1998)). “To determine whether the right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right.” *Jones*, 965 S.W.2d at 213 (citing *State ex rel. Dehn v. Schriro*, 935 S.W.2d 641, 644 (Mo. App. 1996)). “If the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and this discretion cannot be coerced by the courts.” *Jones*, 965 S.W.2d at 213 (citing *State ex rel. Rock Road Frontage, Inc. v. Davis*, 444 S.W.2d 43, 47 (Mo. App. 1969)). In this matter, both questions of fact and questions of law are involved.

Recently, the Western District stated that, “[i]n a proceeding for a writ of prohibition, the actions of the trial judge are presumed proper.” *State ex rel. Nixon v. Kinder*, 129 S.W.3d 5, 7 (Mo. App. W.D. 2003) (citing *State ex rel. Jackson County Prosecuting Attorney v. Moorhouse*, 70 S.W.3d 552, 554 (Mo. App. W.D. 2002)). Further, “[t]he Relator has the burden to establish that the trial judge abused his discretion and that prohibition is proper.” *Id.* “Prohibition will lie only

to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power.” *State ex rel. Nixon v. Kinder*, 129 S.W.3d 5, 7 (Mo. App. W.D. 2003) (citing *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001)). Therefore, abuse of discretion is the appropriate standard of review for this matter.

## **II. Relators’ First Point Relied On :**

**Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under Mo. Rev. Stat. §§ 476.410 And 508.040 Respondent Erroneously Refused To Transfer Venue, In That The Only Resident Defendant Was Pretensively Joined To Create Venue In The City Of St. Louis**

Although Relators claim they are entitled to a transfer of venue out of the City of St. Louis to Saline County, they are in fact not entitled to an order directing Respondent to transfer venue because the only resident defendant, Burlington Northern and Santa Fe Railway Company (hereinafter BNSF), was not pretensively joined and remains a defendant in this action.

On April 5, 2004, relying on this Court’s decision in *State ex. rel. E.I. du Pont de Nemours and Company, Inc. v. Mummert*, 890 S.W.2d 367 (Mo. App. Ct. 1994), the Circuit Court denied Defendants’ motions to transfer as premature, recognizing that a viable claim against Defendant BNSF exists in Count IV of

Plaintiff's Petition. Indeed, it is an undisputed fact that the locomotive involved in this case was owned, operated and/or controlled by Defendant BNSF.

By Relators' own admission, venue is proper in St. Louis Circuit Court based upon Plaintiff's Petition in this case. The Missouri Special Venue Statute § 508.040 expressly provides that venue is proper in any county in which a defendant railroad company owns controls or operates a railroad running into or through such county. It is an undisputed fact that the locomotive involved in this case was owned, operated and/or controlled by Defendant BNSF, a railroad company that owns, controls or operates a railroad into or through the City of St. Louis. Further, Respondent denied Relators' Motion to Transfer Venue based on pretensive joinder because plaintiff's claim under FELA was sufficiently pleaded in his Petition. *Order, City of St. Louis Cir. Ct. (Apr. 6, 2004) p. A6.*

Nevertheless, citing this Court's decision *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 903 (Mo. banc 1996), Relators contend that Plaintiff pretensively joined Defendant BNSF. Defendants' reliance on *Breckenridge* is misplaced, as this Court merely held that, in considering a motion to transfer, the trial court should consider the state of the pleadings when the challenge is adjudicated rather than at the inception of the case:

We hold, therefore, that a challenge of pretensive venue based on defective pleadings should be determined when the challenge is adjudicated and that the trial court should consider the state of the pleadings at that time . . . the



pleadings, whether original or amended, must be premised on information known to plaintiffs when the suit was originally filed.

*Breckenridge*, 920 S.W.2d at 903. In this case, Relators' pretensive joinder claim is not based upon an allegation of defective pleadings; rather, Relators contend that Plaintiff had no reasonable basis for believing that he had an FELA claim against Defendant BNSF upon filing his Petition, which would fail the second test for pretensive joinder. Of course, Plaintiff disputes that contention based upon the allegations of Count IV of his Petition, including the undisputed fact that the locomotive involved in this case was owned, operated and/or controlled by Defendant BNSF, which remains a defendant in this action.

Relators state two tests for pretensive joinder. (*See Relators' Brief p. 16.*) Since plaintiff stated in his Petition a claim from which relief could be granted, which passes the first test, Relators' concentrate on the second test of pretensive joinder, which states:

[the] petition does state a cause of action against the resident defendant, but the record, pleadings and facts presented in support of a motion asserting pretensive joinder establish that there is, in fact, no cause of action against the resident defendant and that the information available at the time the petition was filed would not support a reasonable legal opinion that a case could be made against the resident defendant.

*State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. 1994) (citing *State ex rel. Hoeft*, 825 S.W.2d 65, 66 (Mo. App. 1992).

Additionally, Relator cites the Missouri Supreme Court stating that “both tests are objective, requiring that the plaintiff have a realistic belief under the law and evidence that a valid claim exists.” *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502 (Mo. banc 2004). Relators claim that plaintiff could not have realistically believed himself to be an employee of BNSF because only employees of a railroad may bring suit against the railroad under FELA and that plaintiff had no reasonable basis for believing when he filed his lawsuit that he was an employee of BNSF at the time of his accident. (*Relators’ Brief*, p. 19.) However, “[u]nder common-law principles, there are basically three methods by which a plaintiff can establish his ‘employment’ with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury.” *Bailey v. Missouri-Kansas-Texas R.R.* 732 S.W.2d 248, 250 (Mo. App. E.D. 1987).

Indeed, plaintiff states in his Petition that he was a borrowed servant, which does fall under FELA requirements establishing an employer-employee relationship. *See id.* While subsequent affidavits provided by Relators have indicated that Plaintiff was not in fact the employee of BNSF for purposes of FELA, the second test of pretensive joinder cited by Relator requires that the information available at the time of filing would not have supported the conclusion that a case could be made against the resident defendant. *See Breckenridge*, 920 S.W.2d at 903.

Although BNSF was not operating its car at the time of the accident, a railroad can in fact be liable for injuries sustained by another railroad's employee when an accident involves one of its train cars. *See Allen v. Larabee Flour Mills Corp.* 328 Mo. 226, 40 S.W.2d 597 (Mo.1931) (Carrier furnishing cars for moving grain owes duty to consignee and its employees to supply reasonably safe cars). While plaintiff does not claim that BNSF furnished a defective car, the case law indicates that the railroad owning a railcar can be liable when that car was a "foreign car" on another railroad's track and with another railroad's employees, a conclusion relevant to questions at issue in the case at bar. *See id.* Since he was operating a train belonging to BNSF, upon filing his Petition, plaintiff held the realistic belief that he, as an engineer for a BNSF-owned train, was in fact a borrowed servant pursuant to FELA. Thus, because plaintiff had a realistic belief that he was a borrowed servant of BNSF, and his Petition states a claim for relief, his claim is not precluded by either pretensive joinder test that Relators proffer.

Further, the Missouri Appellate Court – Eastern District's decision in *du Pont* affirms that a motion to transfer is premature at best when a claim remains pending against the defendant upon which venue is based. *See du Pont*, 890 S.W.2d 367. In *Breckenridge*, this Court did not reverse and/or otherwise adversely affect the viability of *du Pont*. Simply put, *du Pont* is good law. Relators have therefore failed to prove that venue is improper and the "[p]arty claiming that defendant has been pretensively joined to support venue in county of residence of party bears both burden of proof and burden of persuasion."

*Breckenridge*, 920 S.W.2d at 902 (citing *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. banc 1994)).

The fact remains that discovery is ongoing in this case. Clearly, based upon *du Pont*, Relators' motions to transfer are, at best, premature and must await further discovery in this case and any disposition of Count IV.

**III. Relators' Second Point Relied On: Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out of The City Of St. Louis To Saline County, Because Under The "Law Of The Case" Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.**

Relators are not entitled to an order directing Respondent to transfer venue of this action out of the City of St. Louis to Saline County under the "law of the case" doctrine, as there has not been an extraordinary writ entered in this case.

Relators claim that the "law of the case" doctrine and *res judicata* doctrine require transfer of this case to Saline County, Missouri.<sup>1</sup> Defendants base those

---

<sup>1</sup> Plaintiff notes that Relators waived this contention by failing to raise it in their Motion for Reconsideration of Court's Failure to Rule on Defendants' Motion to Transfer Venue Based on Pretensive Joinder.

assertions on a writ issued by Missouri Appellate Court – Eastern District in another case that was voluntarily dismissed.<sup>2</sup> Although the writ was issued on the same parties, the case did not include a valid claim against a resident defendant, which does exist in the case at bar.

“The ‘law of the case’ doctrine governs successive adjudications involving the same issues and facts.” *Oldaker v. Peters*, 869 S.W.2d 94, 97 (Mo. App. 1993). Also, the “law of the case” doctrine only involves a single subject case, as the appellate decision becomes the law of the case in subsequent proceedings *in the same cause*, precluding re-examination of issues decided in the original appeal. *McClelland v. Ozenberger*, 841 S.W.2d 227, 231 (Mo. App.1992).

The issue here, however is that this matter was *not* decided in an earlier case as Count IV of plaintiff’s Petition did not exist at the time of the first suit and it is a different claim. Count IV contains valid allegations against BNSF that were nonexistent in the prior suit. As MO. ANN. STAT. § 508.040 provides that venue is proper in either county where “defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in

---

<sup>2</sup> Plaintiff notes that all of the cases concerning the “law of the case” doctrine and *res judicata* doctrine cited by Relators, including *Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541 (Mo. App. 1998), are distinguishable from the instant case, as none of those cases involved a claim refiled after voluntary dismissal.

this state,”<sup>3</sup> Respondent did not err as a matter of law in his decision that, “[s]o long as BNSF is a defendant in this case, venue is proper.” *Order, St. Louis City Cir. Ct. (Dec. 17, 2004), p. A9.*

Simply put, Respondent was perfectly justified in disregarding the earlier case’s Order transferring venue because the writ was not the law of the case on this matter.

**IV. Relators’ Third Point Relied On: Relators Are Entitled To An Order Directing Respondent To Transfer Venue Of This Action Out Of The City Of St. Louis To Saline County, Because Under The Doctrine Of Res Judicata Respondent Erroneously Refused To Transfer Venue, In That The Missouri Court Of Appeals Had Already Once Entered An Extraordinary Writ In This Case, Before It Was Voluntarily Dismissed And Re-Filed, Ordering Respondent To Transfer Venue From The City Of St. Louis To Saline County.**

Relators are not entitled to an order directing Respondent to transfer venue of this action out of the City of St. Louis to Saline County under the doctrine of res judicata because an extraordinary writ has not already been entered in this case.

The *res judicata* doctrine, also known as claim preclusion, applies to final judgments of claims on the merits, operating to bar the reassertion of a cause of action that has been previously adjudicated in a proceeding between the same

---

<sup>3</sup> See MO. ANN. STAT. § 508.040, p.A11.

parties or those in privity with them. *Lomax v. Sewell*, 50 S.W.3d 804, 809 (Mo. App. 2001).

However, once a plaintiff dismisses a case pursuant to Rule 67.02(a), “it is as if the suit were never brought.” *Givens v. Warren*, 905 S.W.2d 130, 132 (Mo. App. 1995); also *Wittman v. National Supermarkets, Inc.*, 31 S.W.3d 517 (Mo. App. E. D. 2000) (voluntary dismissal without prejudice renders that cause of action a nullity; it is treated as never having been filed). In other words, the court may treat the new suit as if the writ was never issued.

In their brief, Relators cite to a commentary stating that “the doctrine of direct estoppel will preclude reconsideration of that issue in a subsequent suit brought in the same court between the same parties on the same cause of action.” (*Relators’ Brief* p. 24.) This is simply inapplicable here because the current disputed matter is not on the same cause of action, as Count IV of plaintiff’s Petition was absent in the first suit.

The law remains that neither the “law of the case” doctrine nor the *res judicata* doctrine can be applied in this case; indeed, this matter involves a new and distinct case involving claims on which no final judgment has ever been rendered on the merits.

### **CONCLUSION**

For the foregoing reasons, Plaintiff, Thomas Sullivan, respectfully requests that this Court uphold the Honorable Michael P. David’s denial of Relators’

Motion to Transfer Venue and deny Relators' request for Writ of Mandamus or in the Alternative, Petition for Writ of Prohibition.

Respectfully submitted,

By:

Kevin T. Hoerner  
No. 37648

BECKER, PAULSON, HOERNER  
& THOMPSON, P.C.  
ATTORNEYS FOR PLAINTIFF  
5111 West Main Street  
Belleville, IL 62226  
(618) 235-0020  
kth@bphlaw.com



---

APPENDIX TO RESPONDENT'S BRIEF

---

## **TABLE OF CONTENTS**

### **Materials from the Record**

Order, St. Louis County Cir. Ct. (Apr. 6, 2004) .....A1

Order, St. Louis County Cir. Ct. (Dec. 17, 2004) ..... A8

### **Statutes**

Mo. Ann. Stat. § 476.410 ..... A11

Mo. Ann. Stat. § 508.040 ..... A12

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief contains the information required by Mo. R. C. P. 55.03, complies with the limitations in Missouri Supreme Court Rule 84.06(b), and it contains 4,009 words, excluding the parts of the brief exempted; it has been prepared in proportionately spaced typeface using Microsoft Word 1997 in 13 pt. Times New Roman font; and includes a virus-free 3.5" floppy disk in Microsoft Word Format.

---

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the foregoing brief were sent via hand delivery to each of the following on the 26th day of July, 2005:

The Honorable Michael P. David  
Circuit Court of the City of St. Louis  
Civil Courts Building  
10 N. Tucker, 6th Floor  
St. Louis, Missouri 63101  
(314) 622-4827  
Fax: (314) 622-4537, Attn: Hon. Michael David  
*Respondent*

Paul M. Brown  
Thompson Coburn LLP  
One US Bank Plaza  
St. Louis, Missouri 63101  
(314) 552-6000  
Fax: (314) 552-7000  
*Attorney for Defendant Burlington Northern & Santa Fe Railway Company*

Jordan Mark Siverd  
Thompson Coburn LLP  
One US Bank Plaza  
St. Louis, Missouri 63101  
(314) 552-6000  
Fax: (314) 552-7000  
*Attorney for Relators*

---